Supreme Court
FILED

10-1050 No. 10-35

JUL 2 - 2010
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In The
Supreme Court of the United States

CENTRAL FLORIDA INVESTMENTS, INC., *et al.*,

Petitioners,

v.

DAWN GEORGETTE MYERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Eleventh Circuit Court of Appeals affirmed an Amended Judgment finding the petitioners liable for compensatory and punitive damages on a common law battery claim. The questions presented are:

1. Whether the Eleventh Circuit Court of Appeals erred when it decided – in conflict with two other Circuits – that punitive damages awarded for a common law battery claim may be based on conduct from a time-barred Title VII claim.

2. Whether awarding punitive damages for time-barred conduct violates the Due Process Clause of the Constitution or conflicts with this Court's pronouncements on the proper ratio of punitive damages to compensatory damages.

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here are Petitioners David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. (collectively "CFI"); and Respondent Dawn Georgette Myers ("Myers").

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioners, David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; and Westgate Resorts, Ltd., identify Central Florida Investments, Inc.'s parent corporations as the David A. Siegel Irrevocable Trust (99%) and the David A. Siegel Revocable Trust (1%); and identify Westgate Resorts, Ltd.'s parent corporations as Central Florida Investments, Inc. (99%) and the David A. Siegel Irrevocable Trust (.5%). Petitioners further state that there is no publicly held company owning 10% or more of the stock of any of the foregoing entities.

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PETITION FOR A WRIT OF CERTIORARI

CFI respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in this case.

OPINIONS BELOW

The January 6, 2010 Eleventh Circuit order, which is the subject of this Petition and is officially reported at 592 F.3d 1201, is reproduced as App. 1-53 (the "Opinion" or "Decision"). The April 19, 2010 Eleventh Circuit Order denying CFI's motion for rehearing and Myers' motions for rehearing and for rehearing *en banc*, which are not officially reported, are reproduced as App. 54; App. 56, respectively. The January 6, 2010 Eleventh Circuit Judgment is reproduced as App. 58.

STATEMENT OF JURISDICTION

On January 6, 2010 the Eleventh Circuit entered its judgment. On April 19, 2010 the Eleventh Circuit denied a timely petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Constitutional provision at issue in this case is U.S. Const. amed. XIV, § 1. The statutory provisions at issue are Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(e)(1) (1982), Florida Civil Rights

Act ("FCRA"), Chapter 760, Florida Statutes and § 95.11(3)(o), Fla. Stat. (2006).

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 706(c) of Title VII,[1] 42 U.S.C. § 2000e-5(e)(1) (1982) provides:

> A charge under this Section shall be filed [with the Equal Employment Opportunity Commission] within 180 days after the alleged unlawful employment practice occurred . . . except [when] the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed [with the Equal Employment

---

[1] Myers' claim for violation of the Florida Civil Rights Act ("FCRA"), § 760, Fla. Stat. (2006), stands or falls with the Title VII claims. *See Myers v. Central Florida Investments, Inc.*, 237 Fed. Appx. 452, 454 (11th Cir. 2007) (unpublished opinion). Thus, CFI's analysis focuses on Title VII.

> Opportunity Commission] . . . within 300 days after the alleged unlawful employment practice occurred . . .

§ 95.11(3)(o), Fla. Stat. (2006) provides:

> Actions other than the recovery of real property shall be commenced as follows:
>
> * * *
>
> (3) WITHIN FOUR YEARS-
>
> * * *
>
> (o) An action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in subsections (4), (5), and (7).

STATEMENT OF THE CASE

A. Factual Background

Myers sued her former employer, CFI, and its CEO, alleging various wrongs, including federal and state statutory claims for sexual harassment and a common law battery claim. (App. 11, 12).

Ultimately, Myers tried the case just on her harassment and battery claims. (App. 13, 14). During the six-day trial Myers testified to conduct spanning the entire period of her employment with

CFI, dating from early 1995 and ending in 2000. (App. 3-11).

On her Title VII claim, the jury found that none of the alleged acts of harassment took place on or after September 15, 2000, the point at which the statutory limitations period barred recovery. On her battery claim, the jury found that two acts Myers testified to occurred within the statute of limitations, in a 117-day period. (App. 13, 14).

On the battery claim the jury awarded Myers compensatory damages of $102,223.14 and punitive damages of $5,276,640.00, for a total judgment of $5,378,863.14. (App. 14).

The District Court entered judgment on the verdict in that amount. (App. 14).

After hearing post-trial motions, the district court entered an Amended Judgment that Myers take nothing from CFI on her claims under Title VII or the FCRA, but that she recover $103,622.09 in compensatory damages, as well as $506,847.75 in punitive damages on her common law battery claim. (App. 14, 15).

B. Procedural Background

1. The District Court: Removal and Summary Disposition

CFI timely removed Myers' original action to the United States District Court for the Middle

District of Florida from the Circuit Court of the Ninth Judicial Circuit of Orange County, Florida.

Myers thereafter filed a nine count Second Amended Complaint. The amended claims included sexual harassment under Title VII, 42 U.S.C. §§ 2000e, *et seq.* and the FCRA, Chapter 760, Florida Statutes; retaliation under Title VII and the FCRA; retaliation in violation of the Florida Private Whistleblower Act ("Whistleblower"), § 448.101-105, Florida Statutes; and Florida common law claims of negligent retention and supervision, false imprisonment and battery, and a state statutory claim for inducement to prostitution, § 796.09, Florida Statutes. (App. A at 13).

The District Court dismissed Myers' Whistleblower, inducement to prostitution and negligent retention and supervision claims, and then granted CFI summary judgment on the remaining claims of sexual harassment and retaliation. (App. 13). The District Court then remanded the battery and false imprisonment claims to state court. (App. 13).

2. The first appeal to the Eleventh Circuit and first Petition for Writ of Certiorari to this Court

Myers appealed the summary disposition to the Eleventh Circuit, which affirmed, in part, and vacated, in part, finding principally that Myers had presented sufficient evidence to get to trial on her hostile work environment claims. (App. 13). In light of that determination, the Eleventh Circuit

reinstated Myers' state-law battery and false imprisonment claims.

Thereafter, Myers petitioned this Court for Writ of Certiorari in Case No. 07-660. Myers challenged both the District Court's summary disposition of her statutory tangible employment action and retaliation claims and the Eleventh Circuit's Decision to the extent it affirmed the District Court.

This Court denied Myers' Petition for Writ of Certiorari in Case No. 07-660, on February 25, 2008.

3. The Post-Trial Proceedings

After trial, the parties filed various post-trial motions. While the District Court denied several of these motions, the District Court determined that the jury had not made the required findings under state law to support a punitive damages award greater than $500,000.00 and that the judgment should reflect that CFI had prevailed on the sexual harassment claim. (App. 14, 15).

On these bases, the District Court entered an Amended Judgment stating that Myers "shall take nothing" on the Title VII and FCRA claims and reducing the punitive damage award by $4,776,640.00, to $500,000.00. (App. 15). Adjusted for interest, the Amended Final Judgment reflected an award to Myers of compensatory damages of $103,622.09 and punitive damages of $506,847.75 and a total judgment of $610,469.84. (App. 15).

4. The second appeal to the Eleventh Circuit

Both CFI and Myers appealed the Amended Judgment to the Eleventh Circuit. (App. 15).

The Eleventh Circuit affirmed the Amended Judgment in all respects, (App. 1-53) and denied CFI's Motion for Rehearing (App. 54, 55) and Myers' Motion for Rehearing and Rehearing *en banc* (App. 56, 57).

C. Basis for Federal Jurisdiction in first court of first instance

The District Court had jurisdiction in the first instance on removal based on a federal question under 28 U.S.C. § 1331 since Myers asserted a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit Opinion conflicts with decisions in the Second and Third Circuits on the same matter because it leaves standing a punitive damages award based on time-barred conduct. The Decision here, therefore, permits a defendant in the Eleventh Circuit to be punished not only for the conduct that harmed the plaintiff, but also for conduct that is not otherwise actionable.

The Opinion also conflicts with this Court's rulings in *BMW of North America, Inc. v. Gore*, 517

U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) on two of the three "guideposts" for evaluating the appropriateness of a punitive damages award. In this regard, the Opinion goes beyond the procedural and substantive limitation these cases place on punitive damages awards. The Decision thus raises important questions about the constitutional propriety of the Eleventh Circuit using conduct the jury found was time-barred, to support a conclusion that there was a pattern of similar repeated conduct and reprehensibility, which, in turn, justified the more severe and enhanced ratio of punitive to compensatory damages awarded.

I. THE OPINION IS IN CONFLICT WITH DECISIONS OF TWO OTHER CIRCUITS ON THE SAME IMPORTANT MATTER.

Because the statute of limitations under Title VII and the FCRA barred Myers' claim, the jury did not reach the issue of damages on her sexual harassment claims. Evidence introduced at trial relating to Myers' time-barred statutory sexual harassment claims, however, infected the jury's deliberations and ultimately influenced the amount of punitive damages awarded on her common law battery claim. That same time-barred evidence affected the Eleventh Circuit's reasoning in affirming the District Court's Amended Judgment, including the punitive damages award. In effect, the award shreds the applicable statute of limitations by permitting Myers, despite the time bar, to recover punitive damages based on conduct, which was not

actionable and was separate from the two acts the jury concluded were a battery.

A. Two other Circuits have refused to let stand a punitive damages award where it could not be determined what portion of the award was attributable to time-barred claims.

Although the District Court reduced the jury's punitive damages award to $500,000.00, the Eleventh Circuit left the award standing. The reasoning in the Opinion that the time-barred conduct supported a "pattern" of battery and justified punitive damages, conflicts with decisions in two other Circuits on this same important matter.

In *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 477-78 (3d Cir. 1997) Rush sued her employer for sex discrimination, hostile environment sexual harassment, constructive discharge and retaliation, Equal Pay Act violations, and state common-law tort and contract claims. After a two-week trial, the jury found for Rush and awarded her compensatory and punitive damages.

The Third Circuit, however, reversed and remanded. The Court held that the presence of a time-barred claim and the introduction of evidence related to and supporting it "infected" the jury's verdicts on liability on the other timely claims and on the damages award. *Id.* at 484-85. The Court explained that to allow a stale claim to proceed in this way would thwart the administrative procedure established by Title VII, which requires timely filing

of charges for prompt resolution of discrimination controversies. *Rush*, 113 F.3d at 485 *citing EEOC v. University of Pennsylvania*, 850 F.2d 969, 978 (3d Cir. 1988) ("Upholding the University's first-filed suit in this context would undermine the congressional policy favoring prompt resolution of discrimination claims."), aff'd on other grounds, 493 U.S. 182 (1990). The Court explained that it had:

> no intention of shredding the 300-day limitations period by automatically allowing an employee who alleges actionable conduct ... to make claims with respect to any adverse employment actions that occurred during his or her entire period of employment.

Id. at 484-85. On this reasoning the *Rush* Court concluded that when "[i]t is not possible to ascertain what portions of the compensatory and punitive damages awards were attributable" to claims that were time-barred, the damages awards must be vacated. *Id.* at 485.

The Second Circuit in *Annis v. County of Westchester*, 136 F.3d 239 (2d Cir. 1998) followed *Rush* and vacated a punitive damages award in a sex discrimination suit. The Court explained that jury confusion and prejudice to the defendant far outweighed the probative value of the time-barred evidence of sexual harassment. The Second Circuit held that if a court cannot determine what portion of a punitive damages award is attributable to time-barred claims, the damages awards must be vacated. *Id.* at 248.

Because the jury here heard, but rejected Myers' time-barred sexual harassment claims, her battery claim could only succeed and damages could only be awarded based on the two isolated and discrete incidents of battery. These two incidents occurred within a very narrow 117-day period (between May 21 and September 14, 2000), which is the only period that CFI's CEO could have touched Myers in an uninvited and harmful or offensive way that would have created any liability. (App. 13, 14). Although the jury found CFI liable only for the two incidents of battery, the jury still awarded Myers $5,276,640.00 in punitive damages for the claim, an amount later reduced by the District Court to $500,000.00. (App. 14, 15).

The only explanation for the jury's $5 million punitive damages award is the presence and introduction of evidence related to and supporting the time-barred sexual harassment claims, which "infected" the jury's verdict, and the award and amount of punitive damages. That evidence also affected the Eleventh Circuit's reasoning in affirming the Amended Judgment.

To justify the result here, the Eleventh Circuit borrowed a "continuing violation" theory from Title VII and applied it to Myers' common law battery claim. In so doing, the Court used the "public interest" to explain how the jury could consider and use the time-barred conduct in punishing CFI. (App. 34, 35). As the Court explained, "Myers described a pattern of sexual touching ... beginning in 1995 and ending in 2000." (App. 37). "[A] jury," therefore, "may consider material external to the charge..."

because "transgressions that are time-barred" are relevant in a determining whether to award punitive damages. (App. 37). In this regard, the Eleventh Circuit specifically wrote:

> The district court's only error was the suggestion that the similar prior transgressions that are time-barred are in no way relevant to the reprehensibility inquiry; such a conclusion does not follow our precedent. *See Gore*, 517 U.S. at 576-77 ... *State Farm* 538 U.S. at 423 ... (citing *TXO Prod. Corp v. Alliance Res. Corp.*, 509 U.S. 443 at 462 n. 28) (1993)....

Neither *Gore* nor *State Farm* support what the Eleventh Circuit implies: that a claim, for which there would be no liability, is relevant to the reprehensibility inquiry. For sure the cases speak to the issue of a recidivist's conduct and about the "frequency of past conduct," but on their facts *Gore*, *State Farm*, and *TXO* do not condone what happened here: affirming a "make-up" punitive damages award for a time-barred Title VII claim. Indeed, this Court made clear in *State Farm* that "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance...." *Id.* at 424 (1525). The results-driven Opinion here, which is at odds with two other Circuits, establishes as law in the Eleventh Circuit, that a time-barred harassment claim is still compensable through a punitive damages award based on any alleged malfeasance.

Practically speaking and in light of the Decision, the need to prove liability on a time-barred Title VII claim no longer exists in the Eleventh Circuit. If a plaintiff brings a state law claim, the common law tort becomes a surrogate for a time-barred statutory claim, an avenue to an award of punitive damages to "make-up" judicially for the fact the plaintiff did not exercise the required diligence in timely pursuing her Title VII claims. Now, in the Eleventh Circuit, a dilatory plaintiff is excused from suffering the consequences of her own lack of diligence if at trial the alleged Title VII harassing conduct can be re-cast as an intentional tort, and testimony of allegedly unwelcome, salacious harassing Title VII conduct is adduced that invites punitive damages under the common law claim. The award and amount of punitive damages here is out of proportion to the conduct that harmed Myers. *i.e.*, two instances of battery in a 117-day period, and makes it impossible to determine what portion of the punitive damages is attributable to the time-barred claims and to the harm she suffered from the battery.

B. Two other Circuits have refused to punish a defendant for conduct beyond that which harmed the plaintiff.

As the foregoing discussion demonstrates, the testimony with the most dramatic impact on the Eleventh Circuit's rationale and justification for letting the punitive damages award stand was time-barred. If Myers had just brought federal and state discrimination claims there would have been no

liability, and a complete defense verdict. Instead, the reasoning in the Decision revived the stale discrimination claims by linking the time-barred conduct to two discrete acts of battery that occurred within the limitations period. To allow Myers to use alleged conduct from her stale sexual harassment claim to support a hypothetical "pattern" of battery that, in turn, justifies punitive damages shreds the limitations period on both statutory harassment claims and punishes CFI for conduct beyond that which harmed Myers.

Section 706(e) of Title VII establishes the applicable federal limitations period here. An aggrieved employee must first file a claim with an administrative agency prior to proceeding to court. 42 U.S.C. § 2000e-5(e)(1). That charge of discrimination must be filed within 300 days of the allegedly unlawful employment action.[2] *Id.*; *United Air Lines v. Evans*, 431 U.S. 553, 555 n.4; (1977) (holding that "[t]imely filing is a prerequisite to maintenance of a Title VII Action.") This Court made clear that Congress defined the jurisdictional prerequisites of Title VII "with precision," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). There is no statutory exception to the limitations period. Myers, however, testified at length about allegedly unlawful, but time-barred Title VII harassing conduct that she claims occurred throughout her employment, dating from early 1995 and ending in 2000. The jury considered that evidence and the Eleventh Circuit condoned its use "as a means 'to

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[2] Under the FCRA a complainant must file an administrative complaint with the State of Florida or the EEOC within 365 days of the purported violation. § 760.11(a), Fla. Stat.

correct evil-doing in areas not covered by the criminal law'" (App. 35), in affirming the award of punitive damages. In so doing, the Court approved punitive damages for more than the conduct the jury found harmed Myers.

Likewise, on her common law claim, Section 95.11(3)(o), Fla. Stat. required Myers to sue upon each incident she now claims amounted to a battery within four (4) years of its occurrence. Myers did not file her claim until May 19, 2004, which meant that any harmful or offensive contact that might have supported a battery claim predating May 21, 2000 was time-barred; yet, she still testified at great length about conduct prior to that date.

Both *Rush* and *Annis* reflect what this Court established in *State Farm*: that a defendant should be punished only for the conduct that harmed the plaintiff, not for any other reason. *State Farm* at 422-23. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of a hypothetical claim or to permit a time-barred claim against a defendant to form the basis for a damages award. *See Id.; see also Rush* at 485. Yet, in affirming here, the Eleventh Circuit permitted the jury to punish CFI for conduct other than the two instances of battery upon which liability was based, saying that a jury may consider any "external" evidence of "prior transgressions" in awarding punitive damages. (App. 37).

If left to stand, the Decision allows an employee who alleges an actionable common law claim to present evidence and recover punitive

damages with respect to any purported adverse employment actions that occurred during her entire period of employment, irrespective of any statute of limitations. Because—as explained in *Rush* and *Annis*—there is no way to determine what portion of the punitive damages award the jury here attributed to the time-barred conduct, certiorari must be granted to resolve the conflict in the Circuits over whether time-barred conduct can be used to establish a pattern of egregious conduct sufficient to award punitive damages.

II. THE DECISION VIOLATES DUE PROCESS AND CONFLICTS WITH THIS COURT'S PRONOUNCEMENTS.

In the Opinion, the Eleventh Circuit recognized that the foundation of the due process inquiry for punitive damages is found in *BMW*, which established three "guideposts" to determine when an award is appropriate or grossly excessive. These three guideposts are: "the degree of reprehensibility" of the defendant's actions; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW* at 574-75. As discussed next, the Opinion here casts doubt on the continuing viability in the Eleventh Circuit of the first and second *BMW* guideposts in constraining punitive damages awards.

A. The award of punitive damages here violates fundamental due process principles by allowing time-barred conduct alone to establish reprehensibility.

The Eleventh Circuit said that "the dominant consideration" in this case was the first *Gore* guidepost, the degree of reprehensibility. (App. 35). In its analysis of this guidepost, the Eleventh Circuit relied on inductive reasoning, to reach a generalized conclusion about the interest being protected and the appropriateness of the punishment the jury imposed on CFI. Along the way, the Court marginalized the statute of limitations on Myers' time-barred Title VII discrimination claim to rationalize and affirm and sanction a more severe punitive damages penalty to compensate Myers for her time-barred claims. (App. 35).

Basically the Court, quoting a state court worker's compensation case, *Byrd v. Richardson-Greenshields Secs.*, 552 So. 2d 1099, 1102 (Fla. 1989) reasoned that the state had a general interest in protecting against "sexual discrimination ... on a remedial statute or on the common law."[3] *Id.* Then

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[3] The Court's reliance on *Byrd* to justify the punitive damage award is misplaced. *Byrd*, a case simply addressing the application of the exclusivity rule on Florida's worker's compensation statutes, did not address either punitive damages or time-barred sexually harassing conduct. The state's interest in protecting employees from pervasive sexual harassing conduct must not remain unchecked. The Court's "ends-justifying-the-means" Decision is devoid of any authority supporting an utter disregard of all applicable statutes of limitations.

the Court characterized the harm to be punished in this case as an "unchecked pattern of 'antisocial behavior.'" *Id.* While the Court acknowledged that CFI's liability on the battery pertained to just two instances of such conduct in "a sixth-month time period," the "antisocial behavior" to which the Court pointed was undeniably the alleged conduct underlying the time-barred discrimination claim to which the Eleventh Circuit said "Myers was subjected [to] for so many years." *Id.* Then, barely hiding its eagerness to excuse Myers' lack of diligence in pursuing a timely harassment claim, the Court said CFI's "antisocial behavior" "underscores the need for punitive damages as a means 'to correct evil-doing.'" *Id.* The Eleventh Circuit's analysis based on moral outrage over time-barred conduct, however, begs the reprehensibility question and overlooks the constitutional limitations placed on punitive damages.

The punitive damages award here against a corporate defendant and its CEO predicated on time-barred conduct represents a radical departure from the protections inherent in the traditional litigation model and creates an unreasonable risk of arbitrary punitive awards. In traditional litigation, the "jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award." John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 141 (1986). Thus, "[a]lthough not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry" that

served to anchor punitive damages to the plaintiff's harm. *Id.* Indeed, that is precisely what both *BMW* and *State Farm* require, but what is lacking here.

In Myers' case, the particular conduct was two instances of battery in a 117-day period, which the Eleventh Circuit had to stretch into a "pattern" over "many years" to justify punitive damages on the very conduct the jury found was time-barred, and not actionable. In effect, the Eleventh Circuit created a pattern of "reprehensibility" for Myers by looking at the time-barred conduct from a separate claim and linking it to the two instances of touching that constituted the battery. In so doing, the Eleventh Circuit justified the imposition and severity of the punitive damages award for what the Court called "evil-doing," where Myers could not.[4] "Elementary notions of fairness enshrined in our constitutional jurisprudence," however, "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574; *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (there is a "potentially greater deprivation of the right to fair notice ... where ... a statute precise on its

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[4] The reprehensibility required for harsh punitive damages entails a high degree of culpability. *BMW*, 517 U.S. at 580. To meet the reprehensibility required for high punitive damages, the Court implied that (as in *TXO*) the misconduct should be intentional, perhaps be gravely deplorable, deserving of severe condemnation, even threatening basic interests of an individual beyond purely economic loss. Conduct deserving the harshest punitive damages would be odious. It would pass moral bounds, be wicked or outrageous, and constitute a grave offense against right or decency, which two instances of battery alone do not support.

face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness situation").

One of the key procedural mechanisms for ensuring notice, and concomitantly for protecting against severe punishments is the limitations period for a claim. Statutes of limitations

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared . . . **even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them**.

Order of R.R. Tele. v. Ry. Express Agency, Inc., 321 U.S. 342 (1944) (emphasis added). No matter how just Myers' time-barred harassment claim may have appeared to the Eleventh Circuit, there is little doubt that—for whatever reason—she did not bring her claim within the applicable statute of limitations period. CFI has, and had, a right to fair notice not only of the conduct that would subject it to punishment, but also the severity of the punishment. It also has a right to be free of stale claims, particularly where punitive damages might be imposed. The net effect of the Eleventh Circuit's expansion of the statute of limitations by judicial construction here, however, is the literal revival of a claim that was left to slumber, revival not through a

liability determination, but through a punitive damages award on a common law claim.

In the end, the Congressionally-legislated requirements of Title VII, including the statute of limitations, cannot be sacrificed for the sake of a plaintiff who lacked diligence in pursuing her claim, but for whom the jury and Eleventh Circuit felt sympathy and supplied reprehensibility in order to give her a "make-up" punitive damages award out of proportion to her actual harm. As the foregoing demonstrates, the continuing viability of the first procedural guidepost in restraining punitive damages awards in the Eleventh Circuit is questionable where time-barred "prior transgressions" singularly establish the reprehensibility factor.

B. The Decision Is Contrary to *BMW* and *State Farm* because it approves a Punitive Damages Ratio of nearly 5:1.

In *State Farm*, this Court significantly reduced the scope of defendant conduct that a state may subject to punitive liability, and pointedly clarified the rigorous three-guidepost analysis the Court established in *BMW*, offering highly structured guidance on the outer limits of punitive damages awards. *State Farm*, 538 U.S. 408. In *BMW*, the Court made clear that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." *BMW*, 517 U.S. at 580. *State Farm* went one step further and made clear that "the conduct must have a nexus to the specific

harm suffered by the plaintiff." 538 U.S. at 422. The second *Gore* guidepost, therefore, focuses a court's analysis on the nexus, on the "relationship between the penalty and the harm to the victim caused by the defendant's actions," *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

In the simplest terms, the second guidepost ties the punitive award to the facts underlying the plaintiff's successful claim and the harm suffered. If there is no link between the two, the award is unreasonable or excessive. The "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* Although this Court in *TXO* upheld a punitive award where "the relevant ratio was not more than 10 to 1," *BMW*, 517 U.S. at 581, the Court also has stated that a punitive damage award of four times the amount of compensatory damages (4 to 1) is "'close to the line'" in terms of constitutional propriety. *BMW*, 517 U.S. at 581.

The punitive damages award here is beyond the line. At an unreasonable or excessive ratio of nearly 5 to 1, the award does not reflect the actual harm occasioned by just two incidents of battery in a 117-day period since the nexus between the punitive and compensatory damages is attenuated. After all, the compensatory damages award did not redress physical harm ordinarily suffered in a battery, but instead was, as the Eleventh Circuit described it, an "award for emotional damages equal to" Myers' annual income. (App. 20). While admittedly there is

no formulaic approach to computing such damages, it is inconceivable that the "emotional harm, emotional damages and emotional suffering" Myers endured as the result of two incidents of battery comprising, at best, a few seconds of contact caused $102,223.14 in harm, coincidentally her to-the-penny salary. Be that as it may, there is little doubt that for the harm occasioned by the two instances of battery, the compensatory damages are substantial. *See e.g., Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156-57 (6th Cir. 2007) (holding $400,000 compensatory damage award was "substantial" and remitting $2.2 million punitive damage award to $400,000).

To complete the ratio analysis here, the Eleventh Circuit had to analyze the nexus between the substantial damages awarded for the actual harm and the amount of punitive damages. The Court did so, and as the Opinion makes clear, the nexus between the "harm" and the punitive damages was judicially supplied, since there is no way to establish as required by *BMW* and *State Farm* that the jury only looked at the actual harm, *i.e.*, the two instances of battery.

The Decision leaves little doubt that the Eleventh Circuit not only believed the jury relied on time-barred conduct in awarding punitive damages, but the Court also condoned the jury doing so. In the end, the Eleventh Circuit approved an Amended Judgment that awarded a year's salary as compensatory damages of $103,622.09 for emotional distress and punitive damages of $506,847.78. These numbers yield a ratio of punitive to compensatory

damages of approximately 4.89:1,[5] which, even if punitive damages were appropriate, reflects an unreasonable and excessive punitive damages award when compared to the substantial compensatory damages awarded for the two instances of battery. (App. 41). In *State Farm*, this Court urged the lower court on remand consider a 1:1 ratio appropriate in light of the "substantial" amount of compensatory damages. 538 U.S. at 429. Even if the Eleventh Circuit here did not supply the nexus for Myers, the ratio (between the compensatory and punitive damages) is excessive and should at best be at a ratio of 1:1.

In sum, the Eleventh Circuit affirmed a judgment where Myers extracted a punitive damages award based on a pattern of conduct that was time-barred, not on the harm caused by the two instances of battery in a six-month period. The decision, if allowed to stand, creates a precedent that subverts the central due process requirements of fairness, proportionality and reasonableness and exposes defendants in the Eleventh Circuit to arbitrary punishment in the form of punitive damages awards based on conduct that is time-barred. This result contravenes the principles set forth by this Court in *BMW* and *State Farm* and warrants a grant of certiorari.

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[5] These figures are inclusive of interest accruing since the original judgment was entered. While the numbers are incrementally greater than the jury verdicts, the resulting ratio is little changed.

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on behalf of David Siegel; Central Florida Investments, Inc.; CFI Sales & Marketing, Ltd.; Westgate Resorts, Inc.; Westgate Resorts, Ltd.; Westgate Lakes, Inc.; and Westgate Lakes, Ltd. (collectively "CFI") this 2nd day of July, 2010.

Respectfully submitted,

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